

CRIMINAL APPEAL (SJ) No.290 OF 1994
WITH
CRIMINAL APPEAL (SJ) No.297 OF 1994

Against the judgment dated 17.08.1994 and order dated
25.08.1994 passed in Sessions Trial No. 15 of 1989 by Shri
Chiranji Singh, Sessions Judge, West Champaran, Bettiah.

1. ISRAIL MIAN SON OF NATHU MIAN,
2. AJULLAH MIAN SON OF ISRAI MIAN&
3. ALIRAJ MIAN SON OF RAHMAN MIAN,
ALL RESIDENT OF VILLAGE-MOULAMA, P.S. CHANPATIA, DISTRICT-WEST
CHAMPARAN. Appellants in Cr. Appeal No.290/94
4. DOMA MIAN,
5. MANAGER MIAN &
6. KASHIM MIAN
ALL SONS OF RAMAN MIAN, RESIDENTS OF VILLAGE MAULAMIAN,
P.S.CHANPATIA, DISTRICT-WEST CHAMPARAN
.... Appellants in Cr. Appeal No.297/ 94

Versus

THE STATE OF BIHAR Respondent

For the Appellants : Mr. Arbind Kumar Sharma, Advocate,

For the State : Mr. Nand Kishore Prasad, A.P.P.

P R E S E N T

HON'BLE MR. JUSTICE SYED MD. MAHFOOZ ALAM

S.M.M.ALAM, J. These Criminal Appeals are directed against the judgment dated
17th August, 1994 and order dated 25th August, 1994 passed by Shri Chiranji Singh,
Sessions Judge, West Champaran, Bettiah in Sessions Trial No. 15 of 1989 whereby he
has been pleased to convict the appellants Doma Mian, Manager Mian, and Kashim Mian
under section 304 Part-I of the Indian Penal Code and sentenced each of them to undergo
rigorous imprisonment for a period of 8 years (eight years) with fine of Rs.2000/- each
and in default of payment of fine rigorous imprisonment for a period of one year. He has
also been pleased to order that out of the amount of fine Rs. 4,000/- shall be payable to
the widow of Bilash Mahto, as compensation. The learned Sessions Judge has further
been pleased to convict appellants Israil Mian, Ajullah Mian and Aliraja Mian under

section 323 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for a period of one year.

Being aggrieved by and dissatisfied with the said judgment and order, all the above mentioned convicts have preferred these appeals.

2. The prosecution case, as per the fardbeyan of P.W.6 Bagar Mahto which was recorded by S.I. Shri I. Minj of Bettiah Town Police Station at M.J.K. hospital, Bettiah on 17.05.1988 at about 8.45 P.M., in brief, is that on 16.05.1988 at about 9.00 P.M., informant Bagar Mahto was at his house, his cousin Bilash Mahto was also there. In the evening of 16.05.1988 the mare of accused Doma Mian had damaged the Tati of the house of informant Bagar Mahto and due to that incident, an altercation had taken place between Doma Mian and his men on the one hand and the informant Bagar Mahto and his cousin Bilash Mahto on the other hand. The informant Bagar Mahto was pressurizing the accused persons to get the Tati of his house repaired. Due to the said incident in the evening the accused Israil Mian, Doma Mian, Manager Mian, Kashim Mian, Ajullah Mian along with some other persons came to the house of the informant in the night at about 9.00 P.M. and they started abusing the informant and his brother Bilash Mahto and then accused Israil Mian gave order to kill the informant as well as Bilash Mahto whereupon all the above named persons along with one Rahman Mian (now dead) started assaulting the informant and Bilash Mahto with Lathi and both the persons sustained injuries on their persons. During occurrence some villagers arrived there and they intervened and tried to save them. On the next day of the occurrence i.e. in the evening of 17.05.1988 both the injured, namely, Bagar Mahto (informant) and Bilash Mahto (deceased) were admitted into M.J.K. hospital at Bettiah where both the persons were treated and his fardbeyan was recorded by S.I. of Bettiah Town police station, who after recording the said fardbeyan (Ext.-6), forwarded the same to Chanpatia police station where on receipt of the fardbeyan, Chanpatia P.S. case no. 50 of 1988 was instituted and formal F.I.R. of the said case (Ext.8) was drawn up against the above

named appellants and one Rahman Mian (now dead). It appears that the statement of Bilash Mahto (deceased) said to be the fardbeyan of the said Bilash Mahto was also recorded by S.I. Shri Baleshwar Prasad Singh of Bettiah Town police station in M.J.K. hospital on 20.05.1988 at about 10.00 P.M.. The said fardbeyan is also on record and has been marked as Ext. 6/1. It further transpires that on 23.05.1988 Shri Krishna Kant Shukla, Judicial Magistrate at Bettiah recorded the dying declaration of Bilash Mahto (deceased) in M.J.K. hospital, which is also on record and has been marked as Ext.4.

3. After institution of the case at Chanpatia police station, the investigation of the case was handed over to P.W.11 Shri Girdhar Mohan Kumar Officer-in-charge of the said police station, who investigated the case and submitted charge-sheet in the case against seven accused persons but during pendency of the trial one accused namely Rahman Mian died and as such only six accused persons faced the trial, who are appellants before this Court.

4. From perusal of the record it appears that appellants Doma Mian, Manager Mian and Kashim Mian were charged for the offence of committing murder of Bilash Mahto punishable under section 302 of Indian Penal Code, whereas, appellants Israil Mian, Ajullah Mian and Aliraja Mian were charged for the offence punishable under section 307/149, 302 read with section 149 of I.P.C. They denied the charges and so, they were put on trial and by the impugned judgment they were convicted.

5. As it appears from the trend of cross-examination, the defence of the appellants was that they were falsely implicated in this case due to enmity and the fact is that the deceased had sustained injury in his abdomen by the horn of the bull and taking all the advantage of the said injury, the informant's side falsely implicated the appellants. However, in support of this case the defence neither adduced any oral nor documentary evidence.

6. In support of the prosecution case, the prosecution has examined altogether 11 witnesses namely, Pandit Raut P.W.1, Bindeshwar Mahto P.W.2, Laxmi

Mahto P.W.3, Kusum P.W.4, Lalmuni Devi P.W.5, Bagar Mahto P.W.6, Dr. B.N. Sinha P.W.7, Dr. S.K. Upadhyay P.W.8, Shri Krishna Kant Shukla, the then Judicial Magistrate (P.W.9), Gorakh Prasad P.W.10 and Shri Girindra Mohan Kumar P.W.11. Out of the above said witnesses P.W.6 is the informant of this case, P.Ws.7 and 8 are two doctors. P.W.7 had examined the injury of Bagar Mahto and Bilash Mahto and has issued injury reports in this regard marked as Ext. 1 and 1/1. P.W.8 had conducted post-mortem examination on the dead body of Bilash Mahto and had issued post-mortem report marked as Ext.3. P.W.9, who was the then Judicial Magistrate, has proved the dying declaration of Bilash Mahto marked as Ext.4, P.W.10 is a formal witness, who has proved bed-head ticket of deceased Bilash Mahto marked as Ext.5 and P.W.11 is the investigating officer of this case. The remaining witnesses are said to be the eye witnesses of the occurrence.

7. In order to come to the finding that the prosecution has succeeded in proving its case beyond all reasonable doubts, I would like to scrutinize the evidence of the prosecution witnesses available on record. In this connection first of all I would like to discuss the evidence of P.W.6 Bagar Mahto, who is the informant of this case. He is also an injured witness and therefore his evidence is very much material in this case. He has deposed that the occurrence took place about two years and 10 months ago on a Monday and the time was between 8.00 – 9.00 P.M. At that time he was sitting at the door of his house along with his cousin Bilash Mahto. The mare of Rahman Mian had entered into his house and had damaged the Tati of his house whereupon he had asked Rahman Mian and his son to get the Tati repaired but Rahman Mian had refused to make any such repair and due to the said refusal some altercation had taken place between him and the said Rahman Mian and his son. He has further deposed that the appellants along with said Rahman Mian being armed with Lathi and Dabia came to his house and appellant Israil Mian gave order to other appellants to kill the informant whereupon appellants Doma Mian, Manager Mian and Kashim Mian assaulted Bilash Mahto with

Lathi. Appellant Kashim Mian gave blow in the abdomen of Bilash Mahto with Hurra (pointed portion of the lathi) and Israil Mian assaulted the said Bilash Mahto on his back, due to that Bilash Mahto fell down but even then he was assaulted by the above named persons. He (P.W.6) tried to save Bilash Mahto whereupon appellants Aliraj Mian and Ajullah Mian assaulted him with lathi, as a result of which his left hand was fractured. Appellants Israil Mian and Doma Mian also assaulted him with lathi causing injuries on his back, waist, shoulder and thigh. He has further deposed that he as well as injured Bilash Mahto were removed to the hospital at Bettiah where the doctor examined their injuries and treated them. He has further deposed that his statement was recorded at Bettiah hospital by the police officer over which he put his L.T.I. He has further deposed that the police officer also recorded the statement of Bilash Mahto when the said Bilash Mahto regained his consciousness and thereafter a Magistrate also recorded the statement of Bilash Mahto in the hospital. He has further deposed that Bilash Mahto had died in the hospital after 08 days on account of the injuries sustained by him. He has further deposed that the X-ray of the injury of his hand was also done. In cross-examination, he has admitted that Dukhi, Pahwari Sah, Deoki Mahto and Ramdeo Mahto have got their houses near his own house. It appears that the defence has asked this question to show that although some independent witnesses have got their houses near the place of occurrence but they are not the witnesses in this case. It further transpires that in cross-examination also P.W.6 is consistent that Doma Mian, Manager Mian and Kashim Mian had given lathi blow in the stomach of Bilash Mahto. Thus it appears that P.W.6, who is the informant of this case, has fully supported the prosecution case as made out in the fardbeyan and has stood to the test of cross-examination.

8. P.W.1 Pandit Raut is another important witness on the point of occurrence. He is a neighbour of the informant and at the time of alleged occurrence he was present at the shop of informant Bagar Mahto where he had gone for purchasing Bidi. He has also corroborated the evidence of P.W.6 that a mare of Rahman Mian had damaged the Tati of

the house of Bagar Mahto and on the question of repair of Tati, a quarrel had taken place between Bagar Mahto and some of the accused persons. He has further deposed that on the order of Israil Mian accused Doma Mian, Kashim Mian, Manager Mian, Ajullah Mian and Aliraja Mian started assaulting the informant Bagar Mahto and Bilash Mahto and due to the assault Bilash Mahto fell down and Bagar Mahto had got his hand fractured. He has further deposed that both the injured were removed to the hospital. In cross-examination he has admitted this fact that he works as Sepoy of one Mathura Mahto, who is by caste Koeri and the Bilash Mahto and Bagar Mahto are of the same caste. It further appears that on the point of assault to Bagar Mahto and Bilash Mahto by the appellants, this witness was cross-examined at length but he fully stood to the test of the cross-examination and supported the prosecution case in cross-examination also.

9. P.W. 2 is Bindeshwari Mahto. His evidence is that at the time of occurrence he was present at the place of occurrence. The mare of Israil Mian had damaged the Tati of the house of informant Bagar Mahto for which an altercation had taken place between Bagar Mahto and Bilash Mahto on the one hand and the appellants and others on the other hand. He has further deposed that the occurrence took place at about 8.00-9.00 P.M. He has further deposed that on the order of Israil Mian appellants Doma Mian, Manager Mian and Kashim Mian assaulted Bilash Mahto with Hurra of lathi and appellant Israil Mian, Aliraja Mian and Ajullah Mian and one Rahman Mian assaulted informant Bagar Mahto with Danda. Due to assault both the persons sustained injuries and they were removed to hospital at Bettiah but after 4-5 days Bilash Mahto died in the hospital. In cross-examination, he has deposed that he along with Pandit Raut, Sundar Raut and Kashi Thakur had tried to intervene and in the process they had also sustained injuries. I do not find any material discrepancies in the evidence of this witness.

10. P.W.3 Laxmi Mahto is also a witness on the point of occurrence but he is not an eye witness of the occurrence and according to his evidence, he reached at the place of occurrence when the occurrence was over. However, he has deposed that he saw

Bagar Mahto and Bilash Mahto in injured condition. It appears that this witness has been declared hostile by the prosecution as he had deviated from his statement made before the police. Since the witness has been declared hostile by the prosecution, as such I do not attach any importance to his evidence.

11. P.W.4 Kusum is the widow of Bilash Mahto and according to her evidence, at the time of occurrence she was present at her house. She has supported the incident of altercation which had taken place between her husband Bilash Mahto on the one hand and Rahman Mian on the other hand on the question of repair of Tati which was damaged by the mare of Rahman Mian. She has also supported the prosecution case regarding the assault by appellants Doma Mian, Manager Mian and Kashim Mian by lathi to her husband Bilash Mahto causing injury in his abdomen due to which the intestine of her husband was ruptured. She has also corroborated this fact that Bagar Mahto was also assaulted by appellants Ajullah Mian, Doma Mian, Aliraja Mian and Israil Mian and got fractured injury on his hand. She has deposed that on the next day of the occurrence her husband Bilash Mahto and Bagar Mahto were removed to Bettiah hospital and after 08 days her husband died in the hospital on account of the injuries sustained by him during the occurrence. In cross-examination she had admitted that it was dark night when occurrence took place. She has denied the suggestion that her husband had sustained injury in his abdomen due to the blow of horn by a bull. It appears that P.W. 4 being the wife of deceased is a natural witness, as the occurrence had taken place in front of her house.

12. P.W.5 Lalmuni Devi is the wife of informant Bagar Mahto. She has also supported this fact that the mare of Rahman Mian had damaged the Tati of her house and due to that an altercation had taken place between Rahman Mian and Israil Mian on the one hand and her husband on the other hand. She has further supported this fact that appellants Doma Mian, Manager Mian and Kashim Mian had given lathi blow in the abdomen of Bilash Mahto during assault. She has further deposed that appellants had also

assaulted her husband, who had sustained fracture injury on his hand. She has deposed that after eight days of the occurrence Bilash Mahto died. It appears that P.W.5 has fully supported the prosecution case in her evidence and her presence at the place of occurrence appears to be very much natural, as the occurrence had taken place in front of her house during which her husband Bagar Mahto had also sustained injury and was treated at the hospital. It appears that even in cross-examination she is consistent on the point of assault.

13. From the evidence of above said witnesses it appears that all the above said witnesses except P.W.3 Laxmi Mahto have fully supported the prosecution case that on 16.05.1988 in the evening the mare of Rahman Mian had damaged the Tati of informant Bagar Mahto and on the point of repair of the said Tati an altercation had taken place between the said Rahman Mian and others on one hand and informant Bagar Mahto and Bilash Mahto on the other hand. The evidence of the above said witnesses further shows that they have also supported this fact that on the same day at about 9.00 P.M. the appellants along with one Rahman Mian (now dead) assaulted the informant Bagar Mahto and Bilash Mahto with lathi. The evidence of the above said witnesses further shows that the witnesses have supported this fact that appellants Doma Mian, Manager Mian and Kashim Mian gave Hurra blow from lathi in the abdomen of Bilash Mahto, as a result of which he sustained injury in his abdomen and on other parts of his body and it is also clear from their evidence that due to assault Bagar Mahto had sustained fracture injury on his hand besides other injuries on his person.

14. Let me see whether the ocular evidence regarding the assault finds support from medical evidence or not. P.W.7 Dr. B.N. Sinha is the doctor of M.J.K. hospital, Bettiah, who had examined the injuries on the person of informant Bagar Mahto and Bilash Mahto (deceased) on 17.05.1988 at 6.10 P.M. According to his evidence, he had found following injuries on the person of Bagar Mahto:

- (i) Swelling and tenderness of the left lateral half of the hand with fracture of the 5th metacarpal bone confirmed by X-ray.
- (ii) Bruise with parallel margin 2 ½" x 1 ½" on the right lower lateral portion of the abdomen.
- (iii) Scratch 1"x 1" on the lateral aspect of the iliac region.
- (iv) Bruise 3"x 1" on the right scapular region.

He has opined that all the injuries were caused by hard and blunt substance out of which injury no.1 was grievous in nature and the rest were simple, the age of injuries was within 24 hours.

He has further deposed that on the person of Bilash Mahto he had found following injuries:

- (i) The patient was received in senseless and shocked condition and there was distension of abdomen with ecchymosis and tenderness.

He has deposed that the injury in the abdomen of Bilash Mahto might have been caused by lathi and the same was of grievous in nature. He has further deposed that Dr. P.N. Jha operated the injury in his presence on 18.05.1988 at 3.10 P.M. Thus, the evidence of P.W.7 Dr. B.N. Sinha also supports the prosecution case that during assault informant Bagar Mahto had sustained lathi injury on his person from the hands of the appellants and deceased Bilash Mahto had sustained injuries in his abdomen and according to the opinion of P.W.7 the said injury was caused by hard and blunt substance, such as lathi. The evidence of P.W.8 Dr. S.K. Upadhyay, who had conducted post-mortem examination on the dead body of deceased Bilash Mahto further corroborates the prosecution case regarding the assault as his evidence is that deceased Bilash Mahto had injuries on his abdomen for which he was operated upon and during post-mortem 8" long stitched wound was present in the abdomen of the deceased. At paragraph 4 of his evidence P.W.8 has deposed that the injuries found on the person of deceased was ante-

mortem in nature. Thus, the evidence of both the doctors supports the prosecution case of assault.

15. There is one more important witness in this case and he is P.W.9 Shri Krishna Kant Shukla, the then Judicial Magistrate, who had recorded the dying declaration of deceased Bilash Mahto on 23.05.1988. He has proved the said dying declaration of deceased Bilash Mahto recorded by him which has been marked Ext.4, from perusal of which it appears that deceased Bilash Mahto in his dying declaration had also supported this fact that he had received injuries in his abdomen at the hands of the appellants and during that assault Bagar Mahto had also sustained injuries. Thus, I find sufficient evidence on record to hold that the prosecution has succeeded in proving its case.

16. Evidence of P.W.11 Girindra Mohan Kumar, who is investigating officer of this case, establishes the place of occurrence of this case, according to which the place of occurrence of this case is the open land (Sehan) in front of the house of the informant. There appears no ambiguity in the evidence of the prosecution witnesses and practically all the eye witnesses of this case have deposed that the occurrence had taken place in front of the house of the informant and therefore, I hold that from the evidence of the investigating officer coupled with the evidence of eye witnesses examined in this case the place of occurrence of this case stands well proved.

17. As regards the evidence of P.W.10, I am of the opinion that he is simply a formal witness, who has proved the Bed-head ticket of deceased Bilash Mahto which has been marked Ext.5.

Thus, from the evidence of aforesaid witnesses coupled with the evidence of P.W.7 Dr. B.N. Sinha and P.W.8 Dr. S.K.Upadhayay it is established beyond doubt that deceased Bilash Mahto had sustained injuries in his abdomen and other part of his body at the hands of appellants Doma Mian, Manager Mian and Kashim Mian and due to the said injury he died in course of his treatment. It has further established from the

evidence of the above said witnesses that Bagar Mahto had also sustained injuries on his person during the occurrence at the hands of Israil Mian, Ajullah Mian and Aliraja Mian.

18. It has been argued by the learned defence counsel that the circumstances on record shows that deceased Bilash Mahto did not die due to the injuries sustained by him in his abdomen rather he died due to the negligence of the doctor, who performed his operation. He submitted that the circumstances show that injuries on the person of Bilash Mahto including his abdomen were not such serious which required immediate treatment and that is why Bilash Mahto was admitted into the hospital after 24 hours of the alleged occurrence of assault i.e. on 17.05.1988 at 8.45 P.M. whereas the occurrence had taken place on 16.05.1988 at 9.00 P.M. He further argued that as per the evidence on record deceased Bilash Mahto died on 23.05.1988 i.e. after 07 days of the alleged occurrence of assault which shows that deceased Bilash Mahto died due to the negligence of the doctor, who performed the operation upon the injury of Bilash Mahto. The learned defence counsel further submitted that since Dr. P.N.Jha, who had operated the injury of Bilash Mahto was not examined by the prosecution, as such the defence was handicapped in bringing on record the fact that due to the mis-handling by the doctor the deceased Bilash Mahto had died. I am of the view that the argument of the learned defence counsel appears to be correct and the judgment under appeal shows that the trial court had also accepted this contention of the defence and that is why the trial court had convicted appellants Doma Mian, Manager Mian and Kashim Mian under section 304 Part-I of the Indian Penal Code.

19. The learned defence counsel submitted that the trial court had not fully appreciated the contention of the defence and in fact the trial court should have convicted the above mentioned appellants under section 304 Part-II of the Indian Penal Code instead of Part-I of Section 304 of the Indian Penal Code. I am of the view that the argument of the learned defence counsel is not acceptable and I hold that the trial court has rightly convicted the above mentioned appellants under section 304 Part-I of the

Indian Penal Code. As regards the conviction of the remaining three appellants under section 323 of the Indian Penal Code, the defence counsel did not raise any objection. However, on the point of sentence the defence counsel argued that appellant Doma Mian, Manager Mian and Kashim Mian have been awarded imprisonment for a period of 08 years (eight years) under section 304 Part-I of the I.P.C. which appears excessive and harsh in view of the fact that there was every possibility that deceased Bilash Mahto might have died due to the negligence of the doctor. So the defence counsel pleaded for reducing the sentence awarded to the appellants Doma Mian, Manager Mian and Kashim Mian. I am of the view that this argument of the defence counsel is acceptable, as there is every likelihood that deceased Bilash Mahto might have died due to 24 hours delay caused in taking him to the hospital and thereafter improper handling by the doctor, who had conducted operation of his injuries. In such circumstance, I am of the view that the ends of justice will be met by awarding rigorous imprisonment for five years to each of the appellant namely Doma Mian, Manager Mian and Kashim Mian under section 304 Part-I of the Indian Penal Code. So far the imposition of fine of Rs.2000/- each to the above mentioned appellants is concerned, I am of the view that it does not require any change.

20. In the result, I find no merit in these two appeals and accordingly the conviction of Doma Mian, Manager Mian and Kashim Mian, appellants of Cr. Appeal No. 297 of 1994 under section 304 Part-I of the I.P.C. and the conviction of appellant Israil Mian, Ajullah Mian and Aliraja Mian, all appellants of Cr. Appeal No. 290 of 1994 under section 323 of I.P.C. are upheld but the sentence of imprisonment passed against the appellants Doma Mian, Manager Mian and Kashim Mian under section 304 Part-I of the I.P.C. is reduced to rigorous imprisonment of five years each instead of rigorous imprisonment for eight years each. However, the sentence of fine to the above mentioned three appellants and the imprisonment for one year each under section 323 of I.P.C. to all the appellants of Cr. Appeal No. 290 of 1994 is ordered to remain intact.

21. In the result, both these appeals are dismissed with modification in the sentence, as ordered above. The trial court's order of payment of Rs. 4000/- to the widow of Bilash Mahto out of fine amount is also upheld. The appellants are on bail, as such their bail bonds are cancelled and they are directed to surrender before the trial court to serve out the remaining part of their sentences.

(Syed Md. Mahfooz Alam, J.)

Patna High Court,
Patna.
Dated, the 16th October, 2008
NAFR/Uday/

